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No. 00-799

Supreme Court, U.S.
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In The
Supreme Court of the United States

CITY OF LOS ANGELES,

Petitioner,

v.

ALAMEDA BOOKS, INC. and
HIGHLAND BOOKS, INC.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN PLANNING ASSOCIATION AND COMMUNITY DEFENSE COUNSEL IN SUPPORT OF THE CITY OF LOS ANGELES

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INTEREST OF AMICI[*]

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[*] Counsel of record for the parties in this case have consented to the filing of this brief, and their letters are on file with the clerk. Pursuant to Rule 37.6, amici disclose that no counsel for any party in this case authored this brief in whole or in part. No person or entity other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

Twenty-five years ago, this Court decided its first case concerning local land-use controls employed to prevent the "admittedly serious problems" caused by sexually oriented businesses. *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1974). In upholding Detroit's dispersal-type ordinance, the Court emphasized the "city's interest in planning and regulating the use of property for commercial purposes," *Id.* at 62, and came to this common sense conclusion: "We are not persuaded that the Detroit zoning ordinances will have a significant deterrent effect on the exhibition of films protected by the First Amendment." *Id.* at 60.

The Court was correct. None can deny that today purveyors of erotic messages enjoy an abundance, not a shortage, of "alternative avenues of communication" – not only in physical adult businesses, but also in cable television, CDs, DVDs, and the Internet. For nearly three decades, local sexually oriented businesses have continued to spread in both large cities and small towns: "Smaller municipalities that have never had a problem are trying to fix it so they never do. But like Johnston, they are finding it a difficult task. They are up against the complexities of Pornosprawl." Ellen Perlman, *X-Rated Businesses Spread from Cities into Suburbs*, Governing Magazine, Oct. 1997, at 48.

Amicus American Planning Association ("APA") represents the nation's land-use professionals – those charged with addressing the public's interest in how land is used and drafting regulations to ensure that the impacts of adverse land uses are minimized. As a nonprofit, educational research organization with more than 30,000 members nationwide, the APA is the oldest and largest organization devoted to advancing state and local land-use planning "in order to meet the increasing encroachments of urbanization upon the quality of life of [all] citizens." *Young*, 427 U.S. at 73 (Powell, J., concurring) (citing *Euclid v. Amber Realty*, 272 U.S. 365 (1926)).

The APA has forty-six chapters representing all fifty states, including a California State Chapter. More than 4000 of APA's members reside in the State of California. Members of the APA are routinely involved in comprehensive land-use planning and its implementation with land-use regulations. An overriding concern of the APA is that in order for comprehensive land-use planning to foster orderly and beneficial development, communities must have the tools and legal authority to deal effectively with a variety of types of land uses, including sexually oriented uses.

Amicus Community Defense Counsel ("CDC") is a nonprofit legal organization that serves land-use planners, city councils, and municipal attorneys in the area of adult business regulation. CDC provides municipal league training seminars, legal resources, and litigation services for communities dealing with the complexities of controlling secondary effects.

Amici contend that this Court should uphold the Los Angeles dispersal rule, just as it upheld Detroit's dispersal rule – as a "land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent." *Young*, 427 U.S. at 73 (Powell, J., concurring). The lower courts' invalidation of Los Angeles' multiple-use regulation – without describing how it would hamper the free flow of ideas – constitutes a usurpation of local decision-making and a voiding of cities' "reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* at 71 (plurality opinion). *Amici* contend that both the rationale and result of the court below should be reversed.

SUMMARY OF ARGUMENT

1. The First Amendment requires content-neutral "adult" business regulations to be justified by legislative evidence reasonably believed "to be relevant to the problem

the city addresses." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986); *accord Young*, 427 U.S. at 74 ("[T]he legislative judgment is to control in cases in which the validity of a particular zoning regulation is 'fairly debatable.'")

The City of Los Angeles has extensive experience with the secondary effects of multiple-use adult businesses, and has also conducted a study which demonstrates that secondary effects intensify when adult uses are concentrated together. Based on this information, the City reasonably concluded that the increased patronage of combined uses would lead to additional secondary effects, and that, even if the aggregate secondary effects would be no greater than when the same uses were separated into two locations, it is wise to disperse secondary effects into different locations to minimize their impact on any one area.

The lower court ignored the City's history of problems with multiple-use adult businesses and rejected the conclusions of the City's planning experts and council members. In doing so, the court substituted its judgment for that of the legislative body, and should be reversed.

2. The City's regulation is narrowly tailored in that it has restricted no "substantial quantity of speech" and is carefully targeted to affect "only that category of [businesses] shown to produce the unwanted secondary effects." *Renton*, 475 U.S. at 52. Nevertheless, the lower court invalidated the regulation because the legislative body failed to compare the specific secondary effects of multiple-use adult businesses with that of single-use adult businesses.

This rigorous, comparative analysis requirement is foreign to the Court's adult business precedents, and is unnecessary because courts have properly applied the *Renton* rule. By imposing this unreasonable means-end test, the lower court has eliminated the ability of the City's expert

planners to "experiment with solutions to admittedly serious problems," *City of Erie*, 529 U.S at 301 (quoting *Renton* and *Young*), and has created a new "empirical proof" requirement by conflating two distinct aspects of the *O'Brien* test. *Id.* at 300. This new form of intermediate scrutiny imposes an improper burden on legislative bodies and is constitutionally unwarranted. *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180, 213 (1997) (*Turner II*).

ARGUMENT

I. Municipalities Are Not Required To Prove Empirically That Combinations Of Adult Uses Have *More* Secondary Effects Than Singular Adult Uses.

"We do not understand [Respondents] to dispute in any fundamental way the accuracy of [the relevant facts], only their significance." *Turner Broadcasting Systems, Inc.* v. F.C.C., 520 U.S. 180, 214 (1997) (*Turner II*). Respondents Alameda Books, Inc. and Highland Books, Inc., both owned by Steven D. Wiener, have never disputed that combination adult uses do in fact cause secondary effects. *See National City v. Wiener*, 838 P.2d 223, 226 (Cal. 1990) (describing the secondary effects of Wiener's adult bookstore / peep show booth combination, including littered condoms and public sexual activity). Knowing Los Angeles' twenty-year history with these kinds of problems, Respondents have chosen to focus not on the veracity of secondary effects, nor on the regulation's impact (if any) on First Amendment values, but instead on the specificity of one aspect of the legislative evidence. Their new standard for that legislative evidence, which the Ninth Circuit accepted, is unwarranted and would severely hamper cities' efforts to control the adverse impacts of adult businesses.

Specifically, Respondents argue that "the City's 1977 study never made any attempt to evaluate whether independently operating "multiple-use" adult businesses created any greater adverse secondary effects on the surrounding community than [single-use] adult entertainment businesses..." Respondents' Brief in Opposition to Petition for Writ of Certiorari at 12. This is their core argument, and the empirical evidentiary requirement that runs throughout the District Court and Ninth Circuit opinions. District Court Order, Jan. 11, 1998, Joint Appendix, Vol. II at 280 ("If the operation of a bookstore and arcade as a multiple use does not produce the secondary effects observed in the 1977 studies, then the ordinance fails...."); *City of Los Angeles v. Alameda Books, Inc.*, 222 F.3d 719, 726 ("Like the county in *Tollis*, Los Angeles has presented no evidence that a combination of adult bookstore/adult arcade produces any of the harmful secondary effects in the Study.") This rigorous, comparative analysis requirement appears under several headings, including "not narrowly tailored," no "requisite evidence," and "no substantial government interest." However it is cast, this requirement is not the law for content-neutral regulations of adult businesses.

Time, place, and manner regulations are valid if they are: (1) justified without reference to the content of the regulated speech; (2) narrowly tailored to serve a significant government interest; and (3) leave open ample alternative avenues for communication of the information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also United States v. O'Brien*, 391 U.S. 367, 377 (1968) (stating test in slightly different language). The lower court conceded that the regulation at bar is content neutral and that the City has a substantial interest in combating the secondary effects of adult businesses. However, the court concluded that the regulation is not designed to serve the City's interest in combating secondary effects. 222 F.3d at 724. Supplementing the cogent analysis of Counsel for Petitioner,

your *amici* will discuss the basis for the regulation as well as the lower court's misapplication of intermediate scrutiny.

A. Substantial Evidence Justifies Los Angeles' Findings That Combinations Of Adult Uses Cause Secondary Effects.

The City's experiences with sexually oriented establishments, as well as its own study, constitute substantial evidence to support the conclusion that multiple-use adult businesses cause secondary effects. The lower court's opinion would require a formal study of each secondary effect the City seeks to abate and an empirical analysis of the effectiveness of each proposed regulatory provision. Indeed, other applications of the "combination use" regulation – such as prohibiting a nude cabaret from operating under the same roof as an adult motel – would be subject to attack for failure to produce a "study" that such cabaret-motel combinations would be problematic. This Court's precedents establish that the City's interests in reducing prostitution, vice crimes, and urban blight are substantial. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 291 (2000). The lower court's requirement of a "study" for every regulation is an unfortunate departure from this Court's rulings in *Young* and *Renton*, and an alteration of the substantial evidence standard which most cities cannot afford.

"Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Poppell v. City of San Diego*, 149 F.3d 951, 962 (9th Cir. 1998). Conflicting evidence does not prevent "[a] finding from being supported by substantial evidence," *Turner II*, 520 U.S. at 211, and is "irrelevant to the question of whether there is some evidence that does support" the multiple-use prohibition. *DiMa Corp.*

v. Town of Hallie, 185 F.3d 823, 831 (7th Cir. 1999). City planners and elected officials must be allowed "to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 665 (1994) (*Turner I*).

This Court has held that city councils are not required to make "a record of the type that an administrative agency or court does to accommodate judicial review," *id.*, and a court is "not to reweigh the evidence de novo," or to replace the legislature's conclusions with its own. *Turner I*, 512 U.S. at 666. "Governments must be given latitude as to approaches to deal with 'admittedly serious problems.'" *Renton*, 475 U.S. at 52 (citation omitted). For regulations of adult businesses, the "appropriate focus is not an empirical enquiry ... but rather the existence or not of a current governmental interest" that justifies the regulation. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1991) (Souter, J., concurring).

"Against this background of precedent, it is clear beyond question" that the Los Angeles City Council "had broad regulatory power to deal with the problem" of combination adult uses. *Young*, 427 U.S. at 74. Because substantial evidence, both past and present, demonstrates the reasonableness of the multiple-use prohibition, the lower court's decision should be reversed.

1. Los Angeles' Experiences With Adult Businesses, Especially Adult Bookstore / Peep Show Combinations, Demonstrate The Reasonableness Of The Regulation.

For more than thirty years, Los Angeles has sought to control the secondary effects caused by adult businesses.

The lower court's emphasis on whether the 1977 study analyzed adult bookstores and adult arcades as separate units or as single "combination" businesses is misplaced, because combination adult uses cause secondary effects and the City's dispersal requirement is a reasonable land-use regulation to help abate those secondary effects.

To be sure, the City's problems with combination uses were prevalent before the planning department began its study in 1977 and also prior to its explicit adoption of the multiple use regulation in 1983. *See People v. Perrine*, 120 Cal. Rptr. 640 (Cal. Ct. App. 1975) (upholding Los Angeles arcade regulations, noting that peep show booth conduct includes offensive, dangerous, and unlawful acts); *EWAP, Inc. v. City of Los Angeles*, 158 Cal. Rptr. 579 (Cal. Ct. App. 1979) (citing unsanitary acts in bookstore / peep show businesses); *DeMott v. Bd. of Police Comm'rs of the City of Los Angeles*, 175 Cal. Rptr. 879 (Cal. Ct. App. 1981) (same). In fact, the City continues to struggle to prevent the secondary effects of combination uses:

> [D]uring the last two and one-half years, one hundred seventeen arrests have been made which are directly attributable to the presence of Le Sex Shoppe; thirteen additional arrests have occurred in the last three months; three for masturbation within video booths; there had been numerous public complaints to the police department within the same time periods; police efforts to date had been unsuccessful, consuming substantial amounts of time with little success; and the imposition of prior conditions (including security guards and gating) has had little effect.

E.W.A.P., Inc. v. City of Los Angeles, 65 Cal. Rptr. 2d 325 (Cal. Ct. App. 1997)

As a backdrop to the 1983 regulation and as an ongoing problem, these experiences with adult bookstore / arcade combinations in *Perrine*, *EWAP*, *DeMott*, and *Wiener* are "such relevant evidence as reasonable minds might accept as adequate to support a conclusion" that separating combination uses would help to alleviate some secondary effects. The Ninth Circuit's contrary conclusion is "irrelevant to the question of whether there is some evidence that does support" the multiple-use prohibition. *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999). The secondary effects studied by the Los Angeles Planning Department are more than ample evidence to support the City's regulation. Jt. App., Vol. I at 178-179 (showing, among other things, a 372.3 percent increase in prostitution in an area that went from 11 to 88 adult businesses).

Respondents' argument emphasizes that the City's study never proved that individual adult uses cause crime, but only that concentrations of those uses cause crime. Brief in Opposition to Petition for Writ of Certiorari at 12-13. The City, however, never assumed that individual adult uses were benign, but suddenly became malignant when concentrated together. This would be unreasonable as a matter of logic. Rather, the City's previous experiences with adult businesses demonstrated that individual establishments cause problems, and it was logically inferred from those experiences that the secondary effects of adult uses will intensify when adult uses concentrate.

Los Angeles' experience is expressly the type of legislative evidence that this Court has accepted in justifying local regulations to combat secondary effects. Formal studies have never been required, even where government regulations truly affect core political speech. *United States v. O'Brien*, 391 U.S. 367, 378 (1968). Indeed, much less probative evidence has been accepted than what Los Angeles compiled. *City of Erie*, 529 U.S. at 299 (plurality opinion)

("*O'Brien*, of course, required no evidentiary showing at all that the threatened harm was real."). *Renton*, 475 U.S. at 50-51 (upholding reliance on a prior case although dissent noted preamble was added after litigation began and the council "never actually reviewed any of the studies" cited therein); *Barnes*, 501 U.S. at 584 (citing current cases of prostitution at sexually oriented businesses); *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994) (upholding legislative record on testimony that "nude dancing brought a certain element to the neighborhood" and that "there were 'problems in the neighborhood'").

Your *amici* submit that this Court's seminal decision in *Young* should control here. *In Young*, the City of Detroit did *not* conduct a formal study, but simply relied on its experiences and data gathered "from sociologists and urban planning experts, as well as some laymen, on the cycle of decay that had been started in areas of other cities, and that could be expected in Detroit," 427 U.S. at 81 n.4 (Powell, J., concurring).

This Court, rejecting the challenge to the legislative record, upheld the ordinance because "the Council was motivated by its perception" that concentrations of adult businesses wrought a "deleterious effect upon the adjacent areas" and could "contribute to the blighting or downgrading of the surrounding neighborhood." *Id.* at 75. Emphasizing the minimal potential impact that the regulation would have on the flow of ideas, Justice Powell explained that "the legislative judgment is to control in cases in which the validity of the legislation is 'fairly debatable.'" *Id.* (quoting *Euclid v. Amber Realty*, 272 U.S. 365, 388 (1926)).

In this case, the City's evidence showed that individual adult uses cause secondary effects and that these secondary effects intensify when adult uses concentrate. Thus, the City's expert planners concluded that dispersing

adult uses could ameliorate some of those secondary effects. This is a reasonable conclusion, and all that is required to satisfy the deferential test for legislative judgments justifying regulations like these, which do no significantly impact free speech:

> When an individual or a group of individuals is silenced, the message itself is silenced and free speech is stifled.... But a zoning ordinance that merely specifies where a theater may locate, and that does not reduce significantly the number or accessibility of theaters presenting particular films, stifles no expression.

427 U.S. at 81 n.4 (Powell, J., concurring).

The City of Los Angeles, like the City of Detroit in *Young*, has "silenced no message" and has eliminated no "opportunity for a message to reach an audience." *Id.* at 78-79. Substantial evidence shows that the City's regulation is properly aimed at combating the secondary effects of multiple-use adult businesses.

2. Logical Inferences Demonstrate The Reasonableness Of The Regulation.

This Court has held that legislative bodies must be allowed "to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner I*, 512 U.S. at 665. For cities, this ability is nowhere more important than when land-use planning is used to prevent secondary effects, one of the "the most essential function[s] performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." *Young*, 427

U.S. at 80 (Powell, J., concurring) (quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974)).

There are at least two logical inferences supporting the City's reasonable belief that the body of knowledge before it was relevant to the problem the City sought to address.

First, it was reasonable for the Los Angeles City Council to believe that a sex "superstore" or combinations of adult uses would attract a larger number of transients than solitary adult uses would attract. The increase in patronage could easily lead to an increase in illicit activity in or around the premises.

The Court has previously permitted this type of reasonable inferences in adult business cases. For example, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1990), the Court upheld – as applied to adult businesses – an Indiana public indecency law for which *no legislative record existed.* Justice Souter, citing instances of prostitution at adult businesses, concluded: "It is possible, for example, that the higher incidence of prostitution and sexual assault in the vicinity of adult entertainment locations results from the concentration of crowds of men predisposed to such activities..." *Id.* at 586 (Souter, J., concurring).

Similarly, planning experts in Los Angeles were entitled to draw similar conclusions about "combined" adult uses and their tendency to produce harmful secondary effects. It is clear that the Planning Department considered "multiple use" establishments to be another manifestation of the "concentration" problem targeted by the 1977 ordinance. Staff Report to the City Planning Commission, Jt. App., Vol. I at 27. Specifically, the staff noted that "the degree of deleterious effects of adult entertainment businesses depend[s] largely on the particular type of business and on

how any such business is operated." Jt. App., Vol. I at 38. It was also the staff's expert judgment that the proposed 1983 ordinance "is in substantial conformance with the public necessity, convenience, general welfare and good zoning practice by prohibiting more than one adult entertainment business in the same building, structure, or portion thereof..." Jt. App., Vol. I at 27.

This Court's precedents teach that the City's determinations in this regard are entitled to substantial deference. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000). Nevertheless, the Ninth Circuit rejected the City's conclusions as unreasonable and offered the following analysis:

> Nor could Los Angeles have reasonably concluded that the expansion of an adult bookstore to include an adult arcade would increase the frequency and regularity of activity for the business and heighten the probability that such activity would produce the harmful secondary effects identified in the Study. Such reasoning would justify the prohibition of the simple expansion of a lone adult bookstore in order to accommodate a larger variety of adult products (which, ostensibly, would attract more patrons), and not for the purpose of installing an arcade. Such a prohibition, however, is clearly not supported by the Study.
>
> 222 F.3d at 726.

These statements are irrelevant under this Court's precedents and insufficient to justify invalidation of the City's regulation.

The first statement, that combining uses will not increase business activity and the attendant secondary effects, is illogical because the record reveals that Mr. Wiener himself deliberately contravened the regulation and combined two adult uses in order to *increase patronage* to his peep show booth operations, which supposedly struggle to make money. Declaration of Steven D. Wiener, June 27, 1997, J.A. at 235; *id.* at 230 ("[I]t is my opinion that an adult arcade has a significantly greater chance of succeeding and remaining in operation if such business operates within an adult bookstore.") This economic – not constitutional – interest in increased patronage is the reason that combined uses exist.

The first statement of the Ninth Circuit's analysis is also irrelevant because it merely states an inconsistent conclusion drawn from the evidence. Such a conflicting conclusion does not prevent "[a] finding from being supported by substantial evidence," *Turner II*, 520 U.S. at 211, and is "irrelevant to the question of whether there is some evidence that does support" the multiple-use prohibition. *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999). As explained above, more than ample evidence supports the City's judgment that combination uses produce secondary effects. Especially in the absence of *any* contrary evidence, "the city's expert judgment should be credited." *City of Erie*, 529 U.S. at 298.

The court's second statement, concerning a hypothetical "anti-expansion" regulation, is an irrelevant "straw man" argument. As an initial matter, the City never adopted such a regulation, and whether the logical inference about concentrated uses would justify an entirely different regulation is not before the Court. But more important, the court's hypothetical fails to negate the fact that secondary effects attend combination businesses, or the fact that the study's correlation between crime and adult use concentrations is relevant to the secondary effects problem

the City is addressing. The only aspect of this case to which the lower court's hypothetical is relevant is the determination of whether that court substituted its judgment for that of the Los Angeles City Council. It did.

The Fourth Circuit demonstrated the better approach to legislative inferences in *Hart Bookstores, Inc. v. Edmisten*, 612 F.2d 821 (1979). In *Hart*, the Fourth Circuit upheld a virtually identical regulation as furthering the substantial government interest of preventing illicit sexual conduct and the spread of disease. *Id.* at 829. The following comments from that decision support the conclusion that the Court's rationale in *Young* justifies the multiple-use regulation as a reasonable means of dispersing secondary effects:

- "much of our analysis *parallels and draws from* the Mini-Theatres analysis," *id.* at 824;
- "[the two dispersal provisions] *essentially regulate in similar fashion* the place and manner of "adult establishment" operations," *id.* at 824-825;
- "The fundamental *effect sought by both is geographic dispersal* of these operations, in an obvious attempt to reduce the adverse external effects," *id.* at 825;
- "*Comparable regulation* of specific techniques and methods of commerce in erotic materials has not been thought violative of First Amendment values." *id.*;
- "The legislature *could reasonably have determined* that the development of the 'total, under one roof' approach to the marketing of sexually explicit materials and devices tended to produce secondary effects," *id.* at 828;
- "A legislative determination that the dispersal of the marketing activities might ameliorate these secondary effects ... *cannot be thought unreasonable*." *id.* at 828-829.

612 F.2d 821 (emphasis added).

These statements in *Hart* demonstrate the objective reasonableness of the multiple-use prohibition and validate the City's conclusion that the prohibition would advance substantial government interests. Contrary to Respondents' assertions that this regulation is "obscure," dozens of planning departments and city councils – both inside and outside California – have reached this same conclusion and have adopted prohibitions on "multiple use" adult businesses. *See, e.g.*, Gardena, CA, Mun. Code Sec. 18.62.070(B); Lancaster, CA, Mun. Code Sec. 251.026(4); Lompoc, CA, Mun. Code Sec. 8821.2(3)(D); Prescott, AZ, City Code Title 5-7-12-D; Aurora, CO, City Code Sec. 32.5-52(E); Charlotte, NC, City Code Ch. 6, Art. X, Sec. 6-137; Memphis, TN, Ch. 20, Sec.20-126(c).

In studying the concentration issue, the Minnesota Attorney General's Working Group on the Regulation of Sexually Oriented Businesses reached the following conclusion:

> The evidence suggests that the impacts of sexually oriented businesses are exacerbated when they are located near each other. Police officers testified to the Working Group, that "vice breeds vice." When sexually oriented businesses have multiple uses (i.e., theater, bookstore, nude dancing, peep booths), one building can have the impact of several separate businesses.

Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses, June 6, 1989, at 13.

To deal with the secondary effects of adult uses, the Working Group suggested the regulation at issue:

> To reduce adverse impacts from concentration of these businesses, communities should adopt zoning ordinances which set distances between sexually oriented businesses and between sexually oriented businesses and liquor establishments, and should consider restricting sexually oriented businesses to one use per building.

Id. at 5.

Though Respondents would reject this evidence, arguing that the City is "locked in" to its justifications articulated in 1983, the "appropriate focus is not an empirical enquiry ... but rather the existence or not of a current governmental interest" that justifies the regulation. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1991) (Souter, J., concurring). This more current evidence simply validates the evidence of secondary effects of combination uses that Los Angeles has been compiling for more than twenty years.

A second reasonable inference supports the multiple-use prohibition. Even if the regulation does not reduce the overall number of secondary effects, it will nevertheless disperse the current secondary effects of adult uses across a wider geographic area, thereby avoiding the concentration of adverse impacts in any one neighborhood. On this point, the City's prior experiences with multiple-use businesses, its 1977 findings, and its more current problems with adult bookstore and peep show combinations are dispositive. *See e.g., National City v. Wiener*, 838 P.2d 223, 226 (Cal. 1990). Each provides evidence "reasonably believed to be relevant to the [secondary effects] problem that the city addresses." *Renton*, 475 U.S. at 51-52.

Lay aside briefly the fact that Respondents have proffered no conflicting evidence for their idea that combination uses cause no greater secondary effects than singular uses. Suppose that in a given year, police make 100 calls to an adult bookstore (a retail use) for incidents of pornographic litter, patrons engaging in sexual acts in the parking lot, and disorderly patrons causing problems for management. During the same year, police make 100 calls to a peep show booth operation (arcade use) at another location for similar problems. Even assuming that the two adult uses, operated in the same building, would cause only the same total number of police calls (200), the City still has a substantial interest in dispersing the secondary effects to two different locations in order to minimize the adverse impacts in any one location. Knowledge of illicit activity in and around adult uses, including combination uses, is still such relevant evidence as reasonable minds might accept to support the conclusion that the dispersal regulation would reduce the aggregate impact of secondary effects in a neighborhood.

By rejecting these logical inferences, the lower court "reweigh[ed] the evidence de novo," and improperly replaced the legislature's conclusions with its own. *Turner I*, 512 U.S. 622, 666 (1994). Such judicial decision-making eliminates the ability of local governments to "experiment with admittedly serious problems," *Renton*, 475 U.S. at 52, and should be rejected.

Notwithstanding Respondents' repeated reliance on an incorrect view of substantial evidence, and their desire to have the Court rigorously evaluate the economic implications of the statute, Brief in Opposition to Petition for Certiorari at 6-7, Los Angeles' dispersal regulation is supported by past and present facts, prior judicial approval, and logical inferences. Its legislative body is entitled to

judgment as a matter of law. *Turner II*, 520 U.S. at 211; *DiMa*, 185 F.3d at 831.

B. The Ninth Circuit's Rigorous Means-End Requirement Is Foreign To The Doctrine Of Intermediate Scrutiny.

Respondents, and the lower court, made much of the fact that "the Study addressed the secondary impact not of single adult business establishments, but of concentrations of separate, individual adult businesses, and that [combination use] businesses are not separate in the sense that the businesses surveyed in the Study were separate businesses." 222 F.3d at 724. As explained above, this statement is irrelevant because it is undeniable that combination uses cause secondary effects and that this is the problem the City is addressing.

Nevertheless, this comparative analysis standard – wholly absent from this Court's adult business precedents – has been applied to invalidate reasonable municipal ordinances, not only for alleged legislative failure to make comparisons between singular and combination adult uses (as in this case), but also for failure to rigorously compare the problems of adult businesses with those of non-adult businesses. *See Flanigan Enters. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001) (invalidating prohibition on full nudity in alcohol bars simply because bars without nudity had more police calls during a particular period); *but see California v. LaRue*, 410 U.S. 948 (1973) (upholding prohibition on fully nudity in bars without regard for the comparative problems of other businesses). Courts applying this comparative analysis standard generally conclude that the regulation at issue is not narrowly tailored to serve a substantial government interest. However, such a standard is foreign to the doctrine of narrow tailoring.

"The essence of narrow tailoring" is "focusing on the evils the [Government] seeks to eliminate ... [without] significantly restricting a substantial quantity of speech that does not create the same evils." *Turner II*, 520 U.S. at 216 (citing *Ward*, 491 U.S. at 799, n.7). The requirement is met if the rule is "not substantially broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 800. In the adult business context, a regulation is narrowly tailored if it "affect[s] only that category of [businesses] shown to produce the unwanted secondary effects." *Renton*, 475 U.S. at 52. Comparative analysis – between adult and non-adult businesses, or among categories of adult businesses – has never been, and should not be, required. *Schultz v. City of Cumberland*, 26 F.Supp.2d 1128, 1143 (W.D. Wisc. 1998) ("Contrary to plaintiffs' assertion, these findings need not be measured against the law enforcement problems associated with non-sexually oriented businesses in Cumberland. Nothing in Renton or any of the three opinions written by the Barnes majority would require defendant to engage in this type of rigorous, comparative analysis.").

In this case, Respondents have failed to identify any "substantial quantity of speech" that the regulation restricts, or any non-sexually oriented businesses being targeted by the City. Nevertheless, they contend that the dispersal regulation is not narrowly tailored because the City failed to compare the secondary effects of multiple-use adult businesses with those of stand-alone adult businesses. Brief in Opposition to Petition for Certiorari at 12-13. Essentially, Respondents claim that failure to conduct, or rely on, such a comparative study renders the City's determination unreasonable. Unfortunately, the Ninth Circuit accepted Respondents' newly-created standard, 222 F.3d at 724-728, and in the process misapplied *Tollis v. San Bernardino County*, 827 F.2d 1329 (9th Cir. 1987). The lower court's reliance on *Tollis* is clearly erroneous.

In *Tollis*, a county official had interpreted the county's adult use ordinance to apply to mainstream theaters if the theaters showed pornographic films on just one occasion. The plaintiff challenged the ordinance on the grounds that, as interpreted, it was overbroad on its face. *Id.* at 1331. The district court agreed, and granted a permanent injunction. *Id.*

On appeal, the Ninth Circuit affirmed, but instead of couching its decision in terms of overbreadth, it concluded that the ordinance was not narrowly tailored to serve a substantial government interest because the category of regulated establishments went beyond adult businesses and reached establishments not associated with secondary effects:

> Here, the County has presented no evidence that a single showing of an adult movie would have any harmful secondary effects on the community. The County has thus failed to show that the ordinance, as interpreted by the County to include any theater that shows an adult movie a single time, is sufficiently "'narrowly tailored' to affect only that category of theatres shown to produce the unwanted secondary effects." *Renton*, 106 S. Ct. at 931.

Id. at 1333.

The Ninth Circuit concluded that, "[l]ike the county in Tollis," Los Angeles had presented no evidence that combinations of adult uses cause secondary effects. 222 F.3d at 725. However, it is clear that the Ninth Circuit invalidated the San Bernardino County ordinance not because the county failed to show that adult businesses or a subclass of adult businesses produce secondary effects, but

rather because the county interpreted its ordinance to apply to theaters that are *not adult businesses at all* – and therefore do not cause the secondary effects that the county has a substantial interest in abating. Such a defect is absent from this case because the Los Angeles regulation applies only to a narrowly defined category of sexually oriented businesses associated with harmful secondary effects. Whatever the propriety of the *Tollis* decision may be, it has no relevance to this case.

An additional error in the Ninth Circuit's narrow tailoring analysis is highlighted in the court's August 28, 2000 order amending its original opinion. The last sentence of the penultimate paragraph in the court's original opinion stated:

> Therefore, any inference that the statute *could have an ameliorating impact* on the identified harmful secondary effects would be unreasonable under both *Tollis* and *Acorn*.

222 F.3d at 728.

The court's August 28 order modified the above sentence to read:

> Therefore, any inference that, absent the statute, the harmful effects *would be ameliorated* would be unreasonable under both *Tollis* and *Acorn*.

222 F.3d 719, 2000 U.S. App. LEXIS 21759, Order Amending Opinion and Denying Rehearing at 1.

Contrary to the Ninth Circuit's opinion, this Court has never held that every application of the ordinance has to effectively eliminate secondary effects. Such a standard is

foreign to intermediate scrutiny, even as applied to other regulations deserving less deferential review than sexually oriented business regulations deserve. *See, e.g., Turner II*, 520 U.S. at 213. ("The level of detail in factfinding required by the [Respondents] would be an improper burden for courts to impose on the Legislative Branch. That amount of detail is as unreasonable in the legislative context as it is constitutionally unwarranted.")

By requiring the City to prove that the regulation will *substantially* further or even completely achieve the government interest, the Ninth Circuit's approach "conflates two distinct concepts under *O'Brien*: whether there is a substantial government interest and whether the regulation furthers that interest." *City of Erie*, 529 U.S. at 300. This Court has repeatedly held that local governments "must be allowed to experiment with solutions" to the serious problem of secondary effects, *id.* at 301 (quoting *Renton* and *Young*), and the City's regulation is based on logical inferences that it will at least help to solve that problem. Of course, the multiple-use prohibition will not eliminate all illicit activities in adult arcades. But it is not required to do so in order to be reasonable. *Id.* ("To be sure, requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects, but *O'Brien* requires only that the regulation further the interest in combating such effects.") The City's ordinance is likely to further the City's interest in combating secondary effects by preventing an increase in illicit activities and by dispersing secondary effects across a wider geographic area. For these reasons, it should be upheld.

CONCLUSION

The City's regulation has no discernible impact on First Amendment values, and is a reasonable approach to abating the secondary effects of multiple-use adult businesses. Respondents' core argument for heightened

scrutiny of the legislative record has never been the law governing content neutral time, place, and manner regulations for adult businesses. The lower court's decision should be reversed.

Respectfully submitted,

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